

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED

DEC 13 1994

OCTOBER TERM, 1994

*Katia Martinez, Eduardo Martinez Puccini,
and Henny Martinez de Papaiani,*

Petitioners,

v.

*Dirk A. Lamagno, The Drug Enforcement
Administration, and the United States of
America,*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

JOINT APPENDIX

ISIDORO RODRIGUEZ, ESQ.
Attorney for PetitionersDREW S. DAYS, III
Solicitor GeneralLaw Offices of
Isidoro Rodriguez, P.C.
Calle 84, No. 56-51
Piso 2, Oficina 4
Barranquilla, Colombia
(011)57-58-561678/458273BARBARA L. HERWIG
PETER R. MAIER
AttorneysDepartment of Justice
Washington, D.C. 20530
(202)514-2217

JOINT APPENDIX

<u>Date</u>	<u>Description</u>	<u>Page</u>
03/03/93	Certification of Scope of Employment.	JA-1
03/04/93	Notice of Substitution.	JA-3
03/05/93	Order dismissing action against Dirk A. Lamagno with prejudice.	JA-7
04/20/93	District Court Order Granting Defendants' Motion to Dismiss. . . .	JA-9
04/28/94	Unpublished opinion of the United States Court of Appeals for the Fourth Circuit. . .	JA-10

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ,)
EDUARDO MARTINEZ PUCCINI,)
and HENNY MARTINEZ DE)
PAPAIANI)
Plaintiffs,)
v.) Civil Action
DIRK A. LAMAGRO, THE DRUG) No. 93-55-A
ENFORCEMENT ADMINISTRATION,)
AND THE UNITED STATES OF)
AMERICA.)
Defendants.)

CERTIFICATION OF SCOPE OF EMPLOYMENT

I, Richard Cullen, United States Attorney for the Eastern District of Virginia, acting pursuant to the provisions of 28 U.S.C. § 2679, and by virtue of the authority vested in me by the Appendix to 28 C.F.R. §15.3 (1991), hereby certify that I have investigated the circumstances of the incident upon

JA-1

which the plaintiff's claim is based. On the basis of the information now available with respect to the allegations of the complaint, I hereby certify that defendant Dirk A. Lamagno was acting within the scope of his employment as an employee of the United States of America at the time of the incident giving rise to the above entitled action.

/s/
RICHARD CULLEN
United States Attorney

Dated: 3/3/93

JA-2

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ,)
EDUARDO MARTINEZ PUCCINI,)
and HENNY MARTINEZ DE)
PAPAIANI)
Plaintiffs,)
v.) Civil Action
DIRK A. LAMAGRO, THE DRUG) No. 93-55-A
ENFORCEMENT ADMINISTRATION,)
AND THE UNITED STATES OF)
AMERICA.)
Defendants.)

NOTICE OF SUBSTITUTION

PLEASE TAKE NOTICE that pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988), the United States is hereby substituted for Defendant Dirk A. Lamagro.¹ The

¹ The correct spelling of the name of the defendant Drug Enforcement Agent is Dirk A. Lamagno.

grounds for this substitution are:

1. Plaintiff alleges that Defendant Dirk A. Lamagno has committed tortious acts caused by the negligent and wrongful operation of a motor vehicle, resulting in injuries to the plaintiff. The actions alleged in the complaint were committed while the defendant was acting within the scope of his employment with the United States Department of Justice, Drug Enforcement Administration.

2. The Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1), as amended by Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages resulting from the alleged common law torts of federal employees committed within the scope of their office or employment. The plaintiff seeks compensatory damages for

injuries resulting from the allegedly negligent acts of the defendant.

3. Section 2679(d)(1) of Title 28 United States Code as amended by Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides that upon certification by the Attorney General that a federal employee was acting within the scope of employment at the time of the incident out of which the common law claims arise, any civil action arising out of the incident on such claims shall be deemed an action against the United States and the United States shall be substituted as sole defendant with respect to those claims. The Attorney General has delegated certification authority to the United States Attorneys. 28 C.F.R. § 15.3.

4. There are two exceptions to the Exclusivity provisions which are codified at 28 U.S.C. § 2679(b)(2). Neither ex-

ception applies to the claims asserted by the plaintiff.

5. Richard Cullen, United States Attorney for the Eastern District of Virginia, has certified that at the time of the conduct alleged Defendant Dirk A. Lamagno was acting within the scope of his employment.

For the foregoing reasons, the United States is substituted as the defendant with respect to the claims asserted against Defendant Dirk A. Lamagno. The court is respectfully referred to the attached Certification of Scope of Employment.

Respectfully submitted,

RICHARD CULLEN
UNITED STATES ATTORNEY

By: /s/
Rachel C. Ballow
Assistant United States Attorney
1101 King Street, Suite 502
Alexandria, Virginia 22314
Virginia Bar No. 31026
(703) 706-3785

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

KATIA GUTIERREZ DE MARTINEZ,)
EDUARDO MARTINEZ PUCCINI,)
and HENNY MARTINEZ DE)
PAPAIANI)
Plaintiffs,)
v.)
DIRK A. LAMAGRO, THE DRUG)
ENFORCEMENT ADMINISTRATION,)
AND THE UNITED STATES OF)
AMERICA.)
Defendants.)

ORDER

Upon notice of the substitution of
the United States for Defendant Dirk A.
Lamagro, it is hereby

ORDERED, pursuant to 28 U.S.C. §
2679(d)(1) as amended by Public Law 100-
694, that the United States be substitut-
ed as defendant herein in place of Defen-

dant Dirk A. Lamagro and that the caption
of the action be amended accordingly.

It is FURTHER ORDERED that as to
Dirk A. Lamagro, this action is dismissed
with prejudice.

This 5th day of March, 1993.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

KATIA GUTIERREZ DE)
MARTINEZ, EDUARDO MARTINEZ)
PUCCINI, and HENNY MARTINEZ)
DE PAPIANI,)
Plaintiffs,)
v.) CIVIL ACTION
THE DRUG ENFORCEMENT) NO. 93-0055-A
ADMINISTRATION, and THE)
UNITED STATES OF AMERICA,)
Defendants.)

ORDER

For reasons stated from the bench,
it is hereby ORDERED that the defendants'
motion to dismiss is GRANTED, and this
case is DISMISSED.

/s/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 20, 1993

JA-9

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KATIA GUTIERREZ DE MARTINEZ; :
EDUARDO MARTINEZ PUCCINI; :
HENNY MARTINEZ DE PAPAIANI, :
Plaintiffs-Appellants, :
v. : No. 93-1573
DIRK A. LAMAGNO; DRUG :
ENFORCEMENT ADMINISTRATION; :
UNITED STATES OF AMERICA, :
Defendants-Appellees. :
:

Appeal from the United States District
Court for the Eastern District of Virgin-
ia, at Alexandria.

Claude M. Hilton, District Judge.
(CA-93-55-A)

Submitted: December 2, 1993

Decided: April 28, 1994

Before Hall, Wilkinson, and Williams,
Circuit Judges.

Affirmed by unpublished per curiam opin-
ion.

COUNSEL

Isidoro Rodriguez C., LAW OFFICE OF ISID-
ORO RODRIGUEZ & SIBLEY P.C., Barran-
quilla, Columbia, for Appellant,
Kenneth E. Melson, United States Attor-

JA-10

ney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellants Katia Gutierrez de Martinez, Eduardo Martinez Puccini, and Henny Martinez de Papaiani ("Appellants") appeal the district court's dismissal of their personal injury action brought against the Drug Enforcement Administration ("DEA"), DEA Special Agent Dirk A. Lamagno, and the United States pursuant to the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C.A. §2671 (West Supp. 1993). Finding no error, we affirm.

Appellants, citizens of the Republic of Colombia, seek general and special damages for physical injuries and proper-

ty damage incurred in an automobile accident that occurred on the night of January 18, 1991, in Barranquilla, Colombia. Defendant Lamagno, driving a government-owned Ford Bronco, collided with Appellants' vehicle in an intersection.

Appellants filed an administrative claim with the DEA pursuant to 21 U.S.C. §904 (1988) on May 8, 1991. Because the amount of the claim exceeded the DEA's limited settlement authority,¹ the claim was referred to the Department of Justice. No final administrative decision has yet been issued on that claim.

In the absence of a final decision on their administrative claim, and to avoid a statute of limitations bar, Appellants filed this action against Lamagno, the DEA, and the United States.

¹28 U.S.C.A. §2672 (West Supp. 1993).

The United States Attorney filed a Certification of Scope of Employment and Notice of Substitution of the United States for Defendant Lamagno pursuant to 28 U.S.C.A. §2679(d)(1) (West Supp.1993). The district court substituted the United States for Defendant Lamagno and dismissed Lamagno from the case. Defendants then moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court granted that motion. Appellants appeal.

We review de novo the dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989). Dismissal is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts to support his allegations. *Id.*

The FTCA acts as a waiver of the United States's sovereign immunity in limited circumstances. However, the Act specifically excludes certain types of claims, preserving the immunity of the United States. One such exclusion is for "any claim arising in a foreign country." 28 U.S.C. §2680(k) (1988). Accordingly, the United States cannot be subjected to a tort suit of negligence based on an act or omission by an employee or agent of the United States where the claim giving rise to the suit occurred in a foreign country.

The district court properly found that this case falls squarely within the foreign country exception to the Act. It is undisputed that the automobile accident that caused Appellants' injuries occurred in Barranquilla, Colombia, a foreign country. Moreover, the alleged

negligence which proximately caused the accident (failure to adhere to local traffic rules and improper operation of a motor vehicle) arose in Barranquilla.

Appellants advance two arguments to avoid the effect of the foreign country exemption from the FTCA. First, Appellants argue that they are entitled to judicial review under 21 U.S.C. §904 (1988). We disagree. Section 904 states:

Notwithstanding section 2680(k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the operation of the Drug Enforcement Administration abroad.

The plain language of §904 makes no provision for judicial review and we will not broadly imply a waiver of sovereign

immunity. *United States v. Testan*, 424 U.S. 392, 399 (1975). Moreover, while §904 does make reference to §2680(k) (the foreign country exception to the FTCA) and §2672 (allowing administrative payment of claims under the FTCA), we think it notable that §904 does not reference any other statutory provision suggestive of a judicial remedy. Accordingly, we reject Appellants' attempt to circumvent the foreign country exception by means of §904.

Appellants also contend that their case falls within the "headquarters claim" exception to the foreign country exclusion of the FTCA. Specifically, Appellants maintain that the alleged negligence occurred in the United States and not in Colombia. The district court rejected that argument, as do we.

A headquarters claim exists where

negligent acts in the United States proximately cause harm in a foreign country. Such claims typically involve allegations of negligence by agents located in the United States in the guidance of employees who cause damage while in a foreign country, or of activities which take place in a foreign country. *Cominotto v. United States*, 802 F.2nd 1127, 1130 (9th Cir. 1986).

To establish a headquarters claim Appellants must establish a plausible proximate nexus between the acts or omissions in the United States and the resulting damage or injury in a foreign country. *See Eaglin v. United States, Dep't of Army*, 794 F.2nd 981, 983 (5th Cir. 1986). The district court's findings regarding proximate causation is a factual one, subject to a clearly erroneous standard of review. *Cominotto*, 802

F.2nd at 1130. Here, the district court's findings that Appellants failed to demonstrate that the acts or omissions of the United States employees at the DEA Headquarters in Arlington, Virginia, were the proximate cause of the automobile accident in Barranquilla, Colombia is not clearly erroneous.

Appellants cited no authority holding that federal agencies have a duty to provide additional instruction to their employees, properly licensed under state law, before permitting them to operate government vehicles in foreign countries. Thus, the alleged negligence by headquarters personnel is too attenuated to support a headquarters claim in this case. *Eaglin*, 794 F.2nd at 984 n.4. Therefore, we affirm the district court's order dismissing the case for lack of jurisdiction.

We also affirm the district court's order substituting the United States in place of Defendant Lamagno. The FTCA provides that if the Attorney General certifies that the defendant employee was acting within the scope of his employment, the United States shall be substituted as the party defendant. 28 U.S.C.A. §2679(d)(1).

The law in this Circuit is clear that such a certification is conclusive. *Johnson v. Carter*, 983 F.2nd 1316, 1320 (4th Cir.) (en banc), cer. denied, 62 U.S.L.W. 3244 (U.S. 1993). Specifically, we have held that no discretion is given to the district court to review the Attorney General's certification made pursuant to 28 U.S.C.A. §§2679(d)(1), (2). *Johnson*, 983 F.2nd at 1319. Thus, the district court lacked discretion to review the United States Attorney's deter-

mination that Lamagno was acting within the scope of his employment at the time of the accident in Colombia. *Id.*

Finding no error, we affirm the district court's orders.³ We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

³We note that Appellants may yet receive redress for their injuries by virtue of the administrative claim they filed pursuant to 21 U.S.C. §904.